IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ANGEL MENDOZA LOPEZ, Petitioner.	)	2 CA-CR 2007-0294-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200401128

Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

Harriette P. Levitt — Tucson
Attorney for Petitioner

H O W A R D, Presiding Judge.

¶1 A jury found petitioner Angel Mendoza Lopez guilty of promoting prison contraband. The trial court sentenced him to a presumptive, enhanced term of 15.75 years' imprisonment to be served consecutively to the term he had been serving at the time of the offense. This court affirmed his conviction and sentence on appeal. *State v. Lopez*, No. 2 CA-CR 2006-0054 (memorandum decision filed Oct. 18, 2006). Lopez filed a petition for post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P., that the trial court denied after an evidentiary hearing. This petition for review followed. We will not disturb a trial

court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Although we grant review, we deny relief.

¶2 At trial, Lopez apparently did not contest the fact that a "shank" had been found under his bed's mattress in the prison cell he occupied by himself, but theorized that someone else had placed it there without his knowledge. In his petition for post-conviction relief, he alleged trial counsel had been ineffective for failing to "produce[] any evidence to support his theory of the case." He asserted that, "[a]lthough [counsel had known] from his client that the bed sat only 22 inches from the [cell] bars, [counsel had] made no effort to substantiate this claim either by going to the prison and taking photographs of the cell or having an investigat[or] . . . photograph and measure the cell." He maintained that counsel had been ill prepared to, and did not, rebut Officer Angulo's testimony that the bed had been at least six feet away from the bars. Thus, Lopez argued, counsel had effectively "torpedoed" the otherwise viable theory that someone outside the cell had put the shank under Lopez's mattress. He further argued that counsel had not obtained records from the prison store to show that Lopez had not purchased the socks the shank had been wrapped in when it was found. Lopez's trial counsel, a defense investigator, and Lopez testified at the evidentiary hearing. The trial court considered the evidence presented at the Rule 32 hearing in light of the "overwhelming" circumstantial evidence of guilt it found in the trial transcripts. Additionally, the court noted that Lopez had "solely occupied his cell 23 of every 24 hour[s a] day" and that Lopez had "s[t]ated that he was responsible for everything in [it]."

¶3 To prevail on his claim of ineffective assistance of counsel, Lopez had the burden of showing that counsel's performance fell below objectively reasonable standards and that counsel's deficient performance resulted in prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). In this case, assuming arguendo that counsel's performance had been deficient, the trial court found Lopez had failed to show prejudice.

¶4 To show prejudice, a defendant must establish there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d at 69. Therefore, Lopez had the burden of showing that, had evidence been submitted that he had not purchased the socks and/or that his bed was only twenty-two inches from the front bars in his cell, the jury would probably not have found him guilty.

¶5 In his petition for review, Lopez focuses on evidence about the placement of the bed. He contends he "presented evidence at the evidentiary hearing that his bed was very close to the bars of the prison cell and that anyone passing by could have easily placed a knife under his mattress." But he overstates the evidence actually presented at the hearing on his Rule 32 petition. The evidence showed that the cell bars, through which someone would have had to reach in order to place the knife, are spaced three inches apart. The bed is perpendicular to the bars, and the closest end is twenty-three inches from the outside of the bars. The bed itself is seventy-six inches long, and the shank was found in the middle

of the bed—approximately five feet away from the bars. Further, the defense investigator testified that, when he had attempted to reach his arm through the bars, he had only been successful "to a degree"; he had been unable to reach the mattress, although he believed he had been hampered by the bullet-proof vest he had been wearing and his short arms. He also admitted that the mattress was flexible and not "light weight" and that he had only gotten close to lifting it to the middle of the bed when he had attempted to do so even from inside the cell.

¶6 Lopez does not contest the trial court's characterization of the evidence of his guilt presented at trial as overwhelming.[1] Given the nature of the evidence presented at the evidentiary hearing, we cannot say the trial court abused its discretion when it concluded no "reasonable probability" exists that, had defense counsel effectively represented Lopez at trial and performed as Lopez claims he should have, the jury would have found him not guilty.

¶7 Although we grant review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

[1]We note that Lopez has not provided the trial transcripts to this court in conjunction with his petition for review. It was his responsibility to do so. *See* Ariz. R. Crim. P. 32.9(c); *State v. Wilson*, 179 Ariz. 17, 19 n.1, 875 P.2d 1322, 1324 n.1 (App. 1993). We generally presume missing portions of the record support the trial court's action. *See State v. Printz*, 125 Ariz. 300, 304, 609 P.2d 570, 574 (1980).

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge